

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ULYANCHUK, et al.,

Plaintiff,

v.

BANK OF AMERICA, N.A., et al.,

Defendants.

Case No. C10-0554 MJP

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

This matter comes before the Court on Defendants' Bank of America, N.A. ("Bank of America") and Mortgage Electronic Registration System, Inc.'s ("MERS") motion to dismiss Plaintiffs' claims. Having reviewed the motion (Dkt. No. 9), Plaintiffs' response (Dkt. No. 13), the reply (Dkt. No. 15), and all attached declarations and exhibits, the Court GRANTS the motion to dismiss Plaintiffs' claims.

Background

Plaintiffs Nikolay, Lyubov, and Tetyana Ulyanchuk obtained two loans from Countrywide Home Loans, Inc. ("Countrywide") to purchase their residence. (Compl. ¶ 1.1.) Plaintiffs signed all loan documents on June 22, 2007. *Id.* at ¶ 2.6. Countrywide also gave Plaintiffs a Notice of Right to Cancel, which Plaintiffs executed on June 22, 2007. (Brown Decl., Exs. A, B.) Plaintiffs now allege that Countrywide violated TILA by failing to make

1 required initial disclosures about the loans that Countrywide distributed to Plaintiffs. Plaintiffs
 2 claim damages, rescission of those loans, and injunctive relief as a result of Countrywide's
 3 alleged TILA violation.

4 Plaintiffs have filed suit against Bank of America, MERS, and LS Title of Washington.
 5 Bank of America is the current holder and assignee of the Plaintiffs' two loans, after Bank of
 6 America acquired Countrywide. (Compl. ¶ 1.2.) MERS is an agent and nominee for
 7 Countrywide and its successor, Bank of America, and serves as the designated beneficiary in the
 8 deeds of trust that secure the payment of the loans. *Id.* ¶ 1.3. Plaintiffs filed suit against
 9 Defendants on December 29, 2009. (Compl. at 14.) Plaintiffs intend to stop their monthly
 10 payments on one of their loans. *Id.* at ¶ 2.10.

11 Analysis

12 A. Motion to Dismiss Standard

13 To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), Plaintiffs must allege
 14 "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its
 15 face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550
 16 U.S. 544, 570 (2007)). A claim is plausible when the alleged facts allow the court to draw a
 17 reasonable inference that the defendant is liable for the alleged conduct. *Id.* at 550 U.S. at 545.

18 Plaintiffs argue that the Court should review Defendants' motion to dismiss as a motion
 19 for summary judgment instead. Plaintiffs reason that because Defendants' motion to dismiss
 20 relies on three exhibits that are outside of the pleadings (Brown Decl., Exs. A, B, and C), the
 21 motion to dismiss converts into a motion for summary judgment under Fed. R. Civ. P. 12(d).
 22 This is not wholly accurate. On a motion to dismiss, a court can consider a document that is not
 23 physically attached to a complaint if the complaint necessarily relies on the document and if the
 24 document's authenticity and relevance are not in question. *Coto Settlement v. Eisenberg*, 593
 25 F.3d 1031, 1038 (9th Cir. 2010). Here, the complaint references a number of documents that
 26 Plaintiffs signed for their loans, including the documents that the three exhibits in question

1 present. (Compl. ¶ 2.6.) As Plaintiffs do not challenge the authenticity or relevance of the
2 exhibits, the Court can consider these documents for Defendants' motion to dismiss without
3 converting it into a motion for summary judgment.

4 B. Damages Claims under TILA

5 Plaintiffs seek damages for Countrywide's alleged violation of TILA. (Compl. ¶ 3.1.)
6 Plaintiffs claim that Countrywide failed to make timely initial disclosures about their loans, as
7 required under 15 U.S.C. § 1640(a)(2). A party can bring an action under TILA within one year
8 from the date of the violation at hand. 15 U.S.C. § 1640(e). Where a party allegedly fails to
9 make TILA-required disclosures, the date of the violation is the date that the loan documents are
10 signed. See Meyer v. Ameriquest Mortgage Co., 342 F.3d 899, 902 (9th Cir. 2003) ("The failure
11 to make the required disclosures occurred, if at all, at the time the loan documents were
12 signed."). In this case, the alleged TILA violation would have occurred when Plaintiffs signed
13 their loan documents on June 22, 2007. Plaintiffs then filed their claims for damages on
14 December 29, 2009. (Pltf's Opp.Br. at 4.) As more than one year passed after Defendants'
15 alleged violation, Plaintiffs cannot bring an action under TILA for damages now.

16 Plaintiffs have not demonstrated sufficient facts to state a plausible claim for damages
17 against Defendants under this cause of action.

18 C. Rescission Claims under TILA

19 Plaintiffs seek to rescind the loans based on Countrywide's alleged TILA violations.
20 (Compl. ¶ 3.2.) The right to rescind, however, does not apply to residential mortgage
21 transactions. 12 C.F.R. 226.23(f)(1). A residential mortgage transaction "means a transaction in
22 which a mortgage, deed of trust . . . or equivalent consensual security interest is created or
23 retained in the consumer's principal dwelling to finance the acquisition or initial construction of
24 that dwelling." 12 C.F.R. 226.2(a)(24). Because Plaintiffs used the loans to finance the
25 purchase of their current residence, a residential mortgage transaction, Plaintiffs cannot rescind
26 the loans under TILA.

1 Plaintiffs argue that they never waived their right to cancel or rescind the loans. Plaintiffs
 2 allege that their lender misled them to believe that they had a right to cancel after signing the
 3 Notice of Right to Cancel. This argument does not change the fact that 12 C.F.R. 226.23(f)(1)
 4 prevents parties from rescinding loans used for residential mortgage transactions. Nor does it
 5 explain why Plaintiffs should have a right to cancel beyond three days after June 22, 2007, as
 6 Plaintiffs agreed to upon signing the Notice of Right to Cancel. (Brown Decl., Exs. A, B.)

7 Plaintiffs have not established a valid claim for rescission against Defendants.

8 D. Claims for Injunctive Relief

9 Plaintiffs request a preliminary injunction against Bank of America requiring it to
 10 remove, correct, or refrain from submitting any adverse credit reports regarding Plaintiffs'
 11 potential defaults on one of their loans. A party seeking a preliminary injunction must establish
 12 four factors: (1) the party is likely to succeed on the merits, (2) the party is likely to suffer
 13 irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their
 14 favor, and (4) a preliminary injunction is in the public interest. Sierra Forest Legacy v. Rey, 577
 15 F.3d 1015, 1021 (9th Cir. 2009). Plaintiffs do not explain how public interest or a balancing of
 16 equities would justify a preliminary injunction. Plaintiffs also do not demonstrate how they
 17 would suffer irreparable harm in the absence of an injunction, given that it is unclear whether
 18 they have even defaulted on their loans at this point. Moreover, Plaintiffs do not establish that
 19 they are likely to succeed on the merits of their TILA claims.

20 Plaintiffs have not shown any of the conditions necessary for granting injunctive relief.

21 **Conclusion**

22 The Court GRANTS the motion to dismiss Plaintiffs' damages claim under TILA
 23 because Plaintiffs did not bring their action within one year from when they signed their loan
 24 documents. The Court also GRANTS the motion to dismiss Plaintiffs' claim for rescission under
 25 TILA as there is no right to rescind loans used for residential mortgage transactions. Finally, the
 26

1 Court GRANTS the motion to dismiss Plaintiffs' claim for injunctive relief because Plaintiffs did
2 not establish the necessary conditions for granting injunctive relief.

3 The Clerk shall transmit a copy of this Order to all counsel of record.

4 Dated this __15th__ day of July, 2010.

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8 Marsha J. Pechman
9 United States District Judge
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